HEARING OFFICER, CAREER SERVICE BOARD
CITY AND COUNTY OF DENVER, COLORADO
Appeal No. 72-07

DECISION

IN THE MATTER OF THE APPEAL OF:

GLENN SAMPLE, Appellant,

vs.

DEPARTMENT OF HUMAN SERVICES,
and the City and County of Denver, a municipal corporation, Agency.

The hearing in this appeal was held on April 9, 2008 before Hearing Officer Valerie McNaughton. Appellant was present and was represented by Nora Nye, Esq. The Agency was represented by Assistant City Attorney Niels Loechell. Having considered the evidence and arguments of the parties, the following findings of fact, conclusions of law and order are entered in this appeal.

I. INTRODUCTION

Appellant Glenn Sample was hired as a Youth Worker at the Crisis Center for the Denver Department of Human Services (DHS) on October 30, 2006. The Agency notified him on October 10, 2007 that he had failed to pass probation for that position. The parties stipulated to the admission of Exhibits 3, 9, 13, 16 and 17, and Appellant's Exhibits A, C, D, J – N. Exhibits 5, 6, 8, 10, 14 and B were admitted during the hearing.

II. ISSUE

The only issue in this appeal is whether Appellant established by a preponderance of the evidence that he was a career service employee at the time of his termination, and that he is thus entitled to appeal his termination as a non-probationary employee under Career Service Rule (CSR) § 19-10 A.1.a.

III. FINDINGS OF FACT

At hearing, the parties stipulated to the following facts:

1) Appellant was hired on October 30, 2006 as a Youth Worker at the Agency.

2) At the time of Appellant's hire, the Career Service Rules required that new employees complete training programs during their probation that addressed the topics

of 1) new employee orientation, 2) the city drug and alcohol policy, 3) diversity, 4) ethics and accountability, 5) customer service, and 6) preventing harassment, workplace violence and bullying. CSR § 6-20 A., effective April 1, 2006.

3) The above rule was revised effective January 12, 2007. Thereafter, probationary employees were required to complete training programs that addressed the following topics: 1) new employee orientation, 2) ethics and accountability, 3) preventing harassment, workplace violence and bullying, and 4) any other training required by the DRMC and applicable Executive Orders. CSR § 6-20 A.

4) On or about Nov. 17, 2006, Appellant attended and completed new employee orientation conducted by the Career Service Authority (CSA).

5) Appellant completed the driver training and safe driving course in Dec. 2006.

6) Appellant was promoted to Staff Social Caseworker on Feb. 26, 2007.

7) The Agency completed an End of Probation Notification ("EOPN") on April 25, 2007, indicating that Appellant had successfully completed probation.

8) On or about May 17, 2007, the Agency informed Appellant that he had failed to pass promotional probation in the position of Staff Social Caseworker, and was being returned to the position of Youth Worker.

9) Appellant completed the [medication] administration training class on or about July 10, 2007.

10) On October 10, 2007, Appellant was informed by letter and telephone message that he had failed to pass employment probation. [Proposed Stipulations, filed April 9, 2008.]

A final proposed stipulation related to the issuance of a verbal reprimand. [Proposed Stipulation No. 8.] Based on the representation of the Agency's counsel that the termination of probation was not disciplinary in nature, the stipulation was rejected as not relevant to the issues presented by this appeal.

At the time of Appellant's hire, the Career Service Rules required new employees to complete training in six topic areas. By April 30, 2007, the end of Appellant's six-month period of probation, the rule had been changed to require only three specified training programs, in addition to those mandated by municipal code or executive order. The Agency did not rely on any courses mandated by code or executive order in support of this termination.

The evidence showed that both the Agency and CSA played a part in scheduling and confirming new employee training. Shortly after Appellant's hire, he and others in his hire group met with Agency Human Resources Support Technician Diane Gallegos, who explained and scheduled their new employee orientation. For the convenience of

new employees, the Agency provided training in some required subjects at an Agency location. Ms. Gallegos testified that it was her practice to give each new hire a sheet listing their mandatory training requirements, which states that "[a]pproximately one month prior to the end of the employee's probation, the employee will be notified of their status." [Exh. 16.] Prior to Ms. Gallegos' meeting with new employees, former Administrative Support Assistant Gladys Fitzherbert would confirm by email or phone whether each new hire was available to attend the orientation classes. Ms. Gallegos would get that information from Ms. Fitzherbert, and add it to the sheet given to the employee. If the class was to be conducted by CSA, its training personnel sent an email confirmation to Ms. Gallegos. Ms. Gallegos forwarded that message to the employee's supervisor, with a request that the supervisor pass the message on to the new hire. That was the procedure used in October 2007 to confirm Appellant's registration in the November NEO class. [Exh. J.] If the training database thereafter showed that a hire has not completed the required classes, HR Receptionist Brittany Lewis would notify employees and their supervisors by email.

At the time of Appellant's meeting with Ms. Gallegos, only one day of new employee orientation was available. Ms. Fitzherbert anticipated that the remaining classes would be scheduled in January. On November 17, 2006, Appellant attended and completed the new employee orientation (NEO) training given by the Career Service Authority. [Exhs. 5, 8-2, L.] Appellant testified that the November all-day training included some discussion of the city's policies on ethics, harassment, and workplace violence. Appellant did not recall receiving a sheet listing all mandatory training from Ms. Gallegos, or that there were additional mandatory orientation classes beyond the November training. The sheet given to Appellant listing that training was not offered into evidence by either party. Ms. Gallegos did not maintain copies of the "Mandatory Courses" sheets issued to each employee until around January 2007. After completing the November class, Appellant believed he had satisfied his new employee training requirement.

In fact, two more days of new employee training were required, and were scheduled at the Agency in March, after Appellant's promotion and relocation to a different department. [Exh. 6.] None of the three employees who shared responsibility to arrange new employee training for Appellant recalled speaking to him personally to inform him of the additional training.

Ms. Fitzherbert testified that she was the staff member who confirmed employees' attendance at training by email or phone call, and that the class rosters were generated as a result of her contact with employees by phone or email. Ms. Fitzherbert stated that she showed an employee as confirmed for a class if the employee did not reply to her email. At another point, she testified that the notation "confirmed" on the spreadsheet maintained by the Agency meant the employee informed her that the training was complete. [Exh. 16-2.] On February 26, 2007, two months before his probationary period in the Youth Worker position was due to end, Appellant accepted a promotion to Staff Social Caseworker. [Exh. B-2.] By the time the March classes were held, Appellant was working as a caseworker in a different work location under a different supervisor.

Agency class rosters showed that Appellant was listed as confirmed on March 16 to attend three NEO training sessions, and not confirmed for four classes on March 27th. [Exh. 6.] On October 10th, 2007, the Agency's training software known as TP 2000 showed that Appellant did not attend those courses, but that the "no-shows" occurred on March 13th and 22nd. [Exh. 8.] A transcript printed in November 2007 reflected the same information. [Exh. 5.] A transcript printed December 10, 2007 reflects that Appellant missed those courses, but gives the dates listed on the March class rosters. [Exh. D.]

A review of the rosters for the March classes establishes that the classes were actually held on the dates indicated on the December transcript: March 16th and 27th. The rosters also show that Appellant's attendance was not confirmed for the March 27th classes. [Exhs. 6-3 to 6-6.] The Agency's spreadsheet showed that Appellant was confirmed, but it does not indicate the date of training for which he was confirmed. [Exh. 16-2; K.]

On April 25, 2007, while he was in the caseworker position, Appellant received an executed End of Probation Notification (EOPN) for his Youth Worker job. The report was signed by his supervisor in that position, Rudy Gonzales, Chad Barker as reviewing official, and himself. [Exh. A.] About two weeks later, Appellant was informed that he had failed his promotional probation, and that he was therefore being returned to the job of Youth Worker. [Exh. B-3; stipulation # 9.] Based on his receipt of the EOPN, Appellant believed he had already passed probation as a Youth Worker. Appellant received no notice of the status of his new employee training a month prior to the end of his probationary period, as promised by the statement made on the sheet listing mandatory new employee courses. [Exh. 16.]

On May 30, 2007, the Controller's Office notified Ms. Lewis by email that Appellant and sixty-four other new employees had not completed their new employee training. [Exhs. 17, N.] On June 6th, Ms. Lewis sent Appellant and his supervisor Patricia Hertzler an email that his probation would be extended if he did not complete several listed training courses. [Exh. 14.] Ms. Lewis testified that she received no response to this email from Appellant. At the time, Ms. Lewis was unaware that Appellant had been returned to his Youth Worker position, and that Ms. Hertzler was no longer his supervisor. The email was sent to Appellant's email address in the caseworker position, which Appellant testified was not forwarding emails to his new address. As a Youth Worker, Appellant did not have regular access to a computer. Thus, Appellant did not receive Ms. Lewis' message regarding his failure to complete all mandatory new employee training. [Exh. 14; testimony of Lewis, Appellant.]

On August 15, 2007, Appellant received an email from Assistant City Attorney Linda Davison that he had not attended DHS's mandatory fraud awareness/prevention training, and that he should attend the make-up class scheduled for October 18, 2007. [Exh. 9.] Appellant registered for that class, but never attended because he was terminated prior to that date. [Testimony of Appellant.] Appellant's termination was not based upon his failure to attend the fraud course.

I find that Appellant confirmed for and completed the November 2006 NEO, Day 1 training, and thus had completed the NEO training held again on March 16, 2007 before that date. [Exhs. 6-1; L.] I also find that Appellant was not scheduled for any training in March 2007 because he did not receive notice of it, as he was then working in his promotional position in a different department. In any event, Appellant admits that he did not attend any of the March classes.

Team Leader Yuriko Thiem of the Controller's Office Human Resources (HR) Processing Team testified that her team processes both end of probation notifications and extensions of probation. Ms. Thiem and her team check the training records at CSA, the agencies, or the training software before extending an employee's probation, and then notify the agency of the change. If an employee completes the training before the extended date, the extended probation is terminated on the date the training is completed.

On October 9, 2007, Ms. Thiem sent Agency HR Technical Supervisor Steve Sandoval an email informing him that she had extended Appellant's probation until December 31, 2007 based on Appellant's failure to complete the training requirements, and that she noted the change in the PeopleSoft computer personnel system. [Exh. 10.] Ms. Thiem testified that she recalled seeing the EOPN for Appellant [Exh. A], but stated that an issued EOPN does not count if an employee did not complete the required training.

Mr. Sandoval forwarded Ms. Thiem's email to Senior H.R. Professional Angela Williams, who was in the process of preparing a disciplinary letter for Appellant. Ms. Williams in turn conveyed to Agency management personnel the information that Appellant's failure to complete his training gave them an option other than imposing discipline. Ms. Williams testified that management did not know Appellant had failed to complete mandatory training, but that "they were happy to hear that." On October 10th, Ms. Williams telephoned Appellant and informed him that he had failed to pass employment probation because he had not fulfilled the training requirements. That same day, the letter terminating his employment and rescinding the scheduled pre-disciplinary meeting was delivered to Appellant. [Exh. 3.] This appeal followed.

IV. ANALYSIS

Jurisdiction of this direct appeal of the Agency's termination exists if Appellant establishes by a preponderance of the evidence that he achieved career service status prior to his termination. CSR § 19-10 A.1.a. The parties agree that the sole issue in this appeal is whether Appellant had attained career status at the time of his termination. The parties also agree that if it is determined that he had career status, this action must be reversed, since Appellant was not terminated for cause pursuant to CSR § 5-62 1. and Rule 16. Appellant has the burden to prove that he was a career service employee entitled to invoke the jurisdiction of the Hearing Office. C.R.S. § 24-4-105(7).

Denver's Career Service system provides for merit-based appointment of

applicants, and performance-based retention of city employees. Denver City Charter, § 1.2.1; D.R.M.C. § 18-1. "[T]he Career Service Board shall . . . (5) certify that personnel actions involving employee in the career service personnel system, including . . . disciplinary actions, and terminations are taken in strict accordance with the career service provisions of the charter, career service rules, and any applicable ordinance of the city." D.R.M.C. § 18-2.

The Career Service Rules define career status as "[t]he status of a Career Service employee who has satisfactorily completed an employment probationary period . . ." A probationary period is "[a] period of time following employment appointment . . . which is a work-test period for the employee, and during which the employee is on a trial basis." CSR, Rule 1, Definitions. The purpose of probation is to allow an agency a period after hire for close observation of a new employee to determine if his performance meets required standards, and permit the employee to obtain assistance to adjust to new duties. CSR § 5-50. Employees in probationary status may be terminated at any time during probation, and may not appeal their termination except on specified grounds not alleged in this appeal. Probationary employees are "entitled to such other rights, privileges and benefits as set forth in these Rules." CSR § 5-61.

Probationary status is attained when an employee is first appointed to a career service position, and is held "for the probation period required for the class." CSR § 5-42. A. Career status is attained by "[s]uccessful completion of the probationary period, and the training programs required by Rule 6 . . ." CSR § 5-42 B.1.a. An employee who is promoted while still on probation "shall attain career status in the former class upon satisfactory completion of the number of months required in that former class." CSR § 5-42 B.2. However, all probationary employees, including promotional ones, may have their probation extended "until the training programs have been completed and documentation evidencing such completion has been provided to CSA." CSR § 5-52 B.2.

A. Effect of the April 2007 End of Probation Notification

There is no dispute that the Agency issued an EOPN that Appellant "has successfully completed probation" two days before expiration of the six-month probationary period. [Exh. A.] Appellant admits that he had not completed all required new employee training at the time it was issued. Appellant completed the six month's minimum probationary period in the class of Youth Worker after his promotion to Staff Caseworker, and while he was still performing the latter job. The evidence shows that the Agency did not take action to extend Appellant's probation until October 9, 2007. The next day, the Agency informed Appellant that he was being terminated for failing to complete required training. These facts place at issue the significance of the Agency's issuance of the end of probation notification in April.

The Agency argues that the EOPN was ineffective to end probation, in light of the language of CSR § 5-52 B.2. ("[e]mployees serving . . . probation who have not completed training programs . . . will have their probationary periods extended until the training programs have been completed . . ."), and § 6-20 C. ("[f]ailure to complete the required training . . . shall result in the extension of probation until the course work had been

completed"). The Agency asserts that the detailed statutory scheme created by §§ 5-42, 5-52 and 6-20 operates to automatically extend probation until the required training is complete and documented at CSA. It supports this argument by citing § 5-42 B.2.: "An employee promoted while on employment probation shall attain career status in the former class upon satisfactory completion of the number of months required in the former class." The Agency claims that the word "satisfactory" implies the completion of both the time and training requirements.

Appellant contends that he attained career status by the issuance of the EOPN, and that the Agency has responsibility under the rules to notify employees of their probationary training requirements, and to take positive action to extend probation before it ends if training is not complete. CSR § 6-20.

The rules define both the purpose and duration of probation. That "integral part of the examination process" is to be used for "closely observing the employee's work", assisting the employee's adjustment to work duties, and separating those "whose performance does not meet required standards." CSR § 5-51. The duration of probation is regulated by § 5-52. Subsection B.1. of that rule permits an extension of the six-month probationary period for "up to six (6) months if the Personnel Director considers the best interests of the City to be served thereby." If an employee has not completed training, Subsection B.2. requires an extension of probation "until the training programs have been completed" and documented at CSA.

The rules provide that the CSA, each agency, and the employee all share responsibility for a probationary employee's completion of training requirements. CSA is required "in cooperation with departments and agencies" to document the employee's attendance at training. § 6-10 C. Agency appointing authorities must assure "that their employees have an opportunity to participate in [training programs]", and "are expected to make sure their employees meet the training requirements of this rule." § 6-10 A and C. Employees who do not complete mandatory training risk the extension of their probation until that requirement is satisfied. CSR §§ 5-52 B.2.; 6-20 C. It is therefore appropriate to require each party to take action in accordance with that party's responsibility as defined by the rules.

The Agency's reading of the rules would require an employee and agency to disregard an official notice that probation was successful, and undertake an examination of the training records to determine if mandatory training under § 6-20 had been completed.[1] The evidence in this appeal demonstrated the difficulty of establishing which courses satisfied the rule's requirement of training that "address the . . . topics" of new employee orientation, ethics and accountability, harassment, and other training required by the municipal code and executive orders. Appellant testified that all the enumerated topics were discussed in his full-day orientation course. The Agency claims that Appellant did not attend a total of seven courses, and that the rule in effect on the date of his hire should govern his mandatory training, rather than the amendment to the rule passed before his probation ended. [Agency Closing Argument, p.4.] I find

[1] Here, the training records themselves were internally inconsistent, and varied over time. [Exhs. 5, 6, 8, D.]

that argument unpersuasive, as amendments take effect on their effective date unless otherwise strongly indicated in the rule. In re Reilly, 442 F.2d 26 (C.A. Ill. 1971); CJ.S. Statutes § 412. In addition, using the hire date instead of the effective date of the rule would require the agencies to apply two different training requirements to their current probationary employees: an impractical result that could not be intended by the Career Service Board.

The agency maintains training records, and can easily determine an employee's completion of the courses needed to pass probation. The Career Service Rules place responsibility for certifying the end of probation on the employing agency. Certification of the end of probation under § 5-53 is intended to serve as notice to the employee and to the personnel records of an employee's career service status. Given the importance of that status in creating an employee's due process rights to public employment, that certification cannot be deemed invalid by the agency without disregarding the procedural protections applicable to probationary employees under Rules 5 and 6. CSR § 5-61 5. See Nisbet v. Frincke, 179 P. 867 (Colo. 1919) (retention of probationary employee beyond probationary period entitles employee to protection of civil service rules); Hewitt v. D'Ambrose, 418 F.Supp. 966 (D.C.N.Y. 1976) (completion of probation could not be revoked based on subsequent investigation without pretermination rights); Schrader v. City of Los Angeles, 19 Cal.App.2d 332, 65 P.2d 374 (Cal.App. 1937) (probationary employees are entitled to protection afforded by rules on probation).

B. Late Extension of Probation

"Employee performance during a probationary period shall be documented by probationary reports. Employee performance shall be certified by an end-of-probation notification, or a written statement indicating the employee has passed or failed in completing the probationary period." CSR § 5-53 A. Performance during probation shall also be documented by completion of the end of probation notification form authorized by the CSA. That notice, or a letter notifying the employee, copied to the CSA, that he or she failed to pass probation, "shall be due before the effective date of attainment of career status." CSR § 5-53 B.1. "The date of notification shall be prior to the conclusion of the required probationary period." CSR § 5-53 B. "If it is anticipated that the employee will not pass probation, the agency shall notify the employee of this decision a reasonable time in advance, but no less than two (2) working days prior to the completion of probation date, and shall allow representation at the meeting to discuss this action." CSR § 5-33 D.

The evidence establishes that the Agency acted to extend Appellant's probation for the Youth Worker position on October 9, 2007, five months after it had certified that the probation had been successfully completed. The extension was made to allow Appellant an additional three months to finish his required training. The next day, Appellant's employment was terminated, and a pending disciplinary action was rescinded in light of that termination. This appeal challenges that extension of probation as belated, as well as the termination of the extended probation on October 10, 2007.

The Agency interprets the rules as requiring an automatic extension of probation for an indefinite period if an employee fails to complete new employee training. CSR § 5-52

B.2. Subsection one of that rule allows an extension of up to six months in "the best interests of the City" if an employee's performance during probation indicates the need for such an extension. Subsection two's use of the passive rather than the active voice ("Employees . . . will have their probationary periods extended") does not require a reading that an extension is automatic based on incomplete training. The rule must be read *in pari materia* with the rest of Rule 5 to determine whether it requires an agency to act to extend probation, or whether it is an employee's incomplete training itself that extends the probation. As concluded above, an automatic extension of probation based on records available only to the agency would place Appellant in a status different from those listed in § 5-41 during the interim between the certified end of his probation and its renewal five months later. It is therefore inconsistent with that rule's intent to restrict employee status to the five named in § 5-41. It would also disregard the Agency's responsibility to assure its employees have the opportunity to meet training requirements. § 6-20 C.

The Agency did not extend Appellant's probation under § 5-52 B. prior to the conclusion of the required probationary period, in accordance with § 5-53 B.2. Instead, the Agency certified his successful completion of probation under the latter rule. The Agency's belated attempt to extend the already-terminated probation was ineffective to renew that probationary period. Any other interpretation of the rules would create uncertainty in the status of an employee after a certified end of probation but before a belated extension of probation, contrary to the intent of CSR § 5-41 to maintain clear employee status identifications for all employees.

Moreover, the Agency did not issue its notice that Appellant would not pass probation "prior to the conclusion of the required probationary period", as mandated by CSR § 5-53 B.2.

Even if an extension of probation for missing training could occur in a probationary employee, the facts here indicate that Appellant was in promotional probationary status at the time he completed six months in the class of Youth Worker. Under the operation of § 5-42 B.2, Appellant attained career status by the mere completion of those months, even without the mandatory training. An automatic extension of probation if an employee does not complete training would contradict the plain meaning of the rule governing the attainment of career status in the former class while on promotional probation "upon satisfactory completion of the number of months required" in the former class. § 5-42 B.2. "Satisfactory" or "successful" completion of a probationary period does not include completion of training, as shown by the specific mention of the necessity to complete training in subsection B.1.a of that same rule relating to non-promotional probationary employees. Where a word or phrase is omitted in one rule although used in another, it indicates that the omission of that word or phrase was intended by the drafters. Russello v. United States, 464 U.S. 16, 23 (1983); Lunsford v. Western States Life Ins., 908 P.2d 79 (Colo. 1996).

The rule governing the attainment of career status while on promotional probation does not contradict § 5-52 B.2. The latter can be read consistently therewith to require that an agency take action to extend probation before it ends, as required for an end of probation notification. § 5-53 B.2. Moreover, that interpretation is consistent with the

definition of probation as a work-test period following appointment under Rule 1, and the relatively recent advent in the rules of specific topics for mandatory training.[2]

Under the peculiar circumstances presented by this appeal, I find Appellant attained career status in the position of Youth Worker at the end of the six-month probationary period, and that he met his burden to establish that he was a career service employee on the date of his termination, October 10, 2007. Therefore, his termination on that date without the protections granted a career service employee under Rule 16 was not proper.

ORDER

Based on the foregoing findings of fact and conclusions of law, the Agency termination action dated October 10, 2007 is REVERSED.

Dated this 12th day of June, 2008.

Valerie McNaughton
Career Service Hearing Officer

NOTICE OF RIGHT TO FILE PETITION FOR REVIEW

A party may petition the Career Service Board for review of this decision in accordance with the requirements of CSR § 19-60 *et seq.* within fifteen calendar days after the date of mailing of the Hearing Officer's decision, as stated in the certificate of mailing below. The Career Service Rules are available at www.denvergov.org/csa/career service rules.

All petitions for review must be filed by mail, hand delivery, or fax as follows:

BY MAIL:

Career Service Board
c/o Career Service Hearing Office
201 W. Colfax Avenue, Dept. 412
Denver CO 80202

BY PERSONAL DELIVERY:

Career Service Board
c/o Career Service Hearing Office
201 W. Colfax Avenue, First Floor
Denver CO 80202

BY FAX:
(720) 913-5995 (Fax transmissions of more than ten pages will not be accepted.)

[2] The Career Service Rules did not enumerate mandatory topics for new employee training until seven months before Appellant's hire date. CSR § 6-20, effective April 1, 2006, and revised effective January 1, 2007.